Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

PETITION FOR RECONSIDERATION OR CLARIFICATION

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SUMMARY

The Federal Communications Commission's ("Commission") Report and Order contains ambiguities that must be clarified before wireless carriers can implement the changes adopted on an interim basis for universal service assessments. First, the Commission must clarify that wireless carriers can use either the new wireless safe harbor or their own company-specific good faith estimate of interstate revenues to determine the "relevant interstate portion of the bill" for federal Universal Service Fund ("USF") assessment purposes. Nextel respectfully submits that the Commission did not intend to deny wireless carriers the option of utilizing either the safe harbor – an option that the Commission reaffirmed for wireless providers in the Report and Order – or the reasonable carrier-specific proxies the Commission has encouraged wireless carriers to develop, as the basis for end user line item cost recovery.

As written, Rule 54.712 appears to require wireless carriers to assess and bill each of their customers on their individual actual monthly interstate (and international) usage, using a new line item pass-through. While this might make sense in the landline context, it is unworkable for wireless carriers that typically offer customers a "bucket of minutes," and do not distinguish or separate traffic on an interstate/intrastate basis. There is no basis or rationale in the record of this rulemaking for the Commission to force the wireless "round peg" into the wireline "square hole." Commercial Mobile Radio Service ("CMRS") carriers should have the flexibility to apply either the new safe harbor or a good faith estimate of carrier-wide interstate revenues to each customer's total telecommunications revenue in determining the customer's USF assessable revenue. This methodology is the only one that makes sense in the CMRS context and is consistent with the record in this proceeding – namely that no wireless carrier has

billing systems with anywhere near the level of granularity required to relate a usage sensitive USF charge to each customer's specific monthly interstate use and related revenues.

Second, the Commission's long-standing determination to rely on competition in the CMRS marketplace to produce just and reasonable rates is being undercut by the Commission's unexplained determination to modify the manner in which all carriers recover their USF costs. The Report and Order limits carrier USF line item pass-through to the Commission's contribution factor, expressly excluding line-item recovery of USF administrative costs and uncollectibles. This is impermissible CMRS rate prescription. There is no justification in the record herein for the Commission to impose an industry-wide prohibition on revealing the true cost of the USF program to wireless subscribers and full recovery thereof via a line item charge. Nor, in an intensely competitive wireless marketplace, should the Commission skew competition by forcing wireless carriers to recover USF administrative costs through competitive rate elements or to absorb them – particularly since there is no evidence in the record herein of USF pass-through abuse by wireless carriers.

The Commission has concluded in every one of its eight CMRS Competition Reports that the marketplace, and not rate regulation, is delivering substantial benefits to the public. Throwing out nearly a decade's worth of deregulation of CMRS rates and micromanaging one aspect of an overall CMRS rate – the USF cost recovery line item – is at odds with everything the Commission has strived to establish and achieve in the CMRS marketplace to date and warrants reconsideration.

Reconsideration is also warranted for the newly adopted "all or nothing" affiliate restriction. The Commission fails to provide any justification for the requirement that wireless carriers report revenues based on the interim wireless safe harbor or on actual revenues across all affiliates. This "all or nothing" rule makes no sense for wireless carriers, which operate in a much more complex corporate environment than other landline carriers and are often "affiliated" with entities that have no say in their day-to-day operations. Indeed, under this new requirement, CMRS carriers that did not have attributable interests in one another under the former spectrum cap will now be required to share information that could inevitably lead to anti-trust violations or other legal consequences. The Commission's requirement fails to consider the unique structure of the wireless market and fails to show how such uniformity would in any way enhance the USF program.

Finally, the Commission must clarify that carriers are permitted to recognize certain exemptions from USF assessments for state and local government customers that are increasingly challenging their obligation to pay USF assessments. Allowing carriers to recognize certain customer exemptions from USF charges eliminates the prospect of carriers being forced to discriminate in favor of state and local government customers and would be consistent with public policy. Such exemptions would also lessen carrier costs of litigation, create a more neutral competitive environment and eliminate administrative burdens on carriers.

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PETITION FOR RECONSIDERATION OR CLARIFICATION

Nextel Communications, Inc. (“Nextel”), by its attorneys, and pursuant to Section 1.429 of the Rules, hereby petitions for reconsideration or clarification of the Commission’s Report and Order modifying the current revenue-based universal service assessment methodology.[1]

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[1] Federal-State Joint Board on Universal Service et al., *Report and Order and Second Further Notice of Proposed Rulemaking,* CC Docket No. 96-45, FCC 02-329 (rel. December 13, 2002) (“Report and Order”).

I. INTRODUCTION.

Nextel is a CMRS provider to approximately ten million domestic customers in the United States. Nextel is one of six facilities-based CMRS carriers whose offerings are considered national in scope. Nextel has been a mandatory contributor to the federal USF since 1997. As a wireless carrier that is consistently working to expand its service area coverage and market services to new customers, Nextel's contributions to the federal USF have more than quadrupled as the applicable contribution factors have risen and Nextel's revenues and subscriber base have grown.

Nextel seeks clarification or reconsideration herein on a number of important issues because the Commission has failed to consider that CMRS is a different industry, with very different competitive and cost realities, than the interexchange or landline local exchange industries. The Commission has adopted a harshly prescriptive USF line item cost recovery for all carriers, including CMRS carriers. CMRS carriers, however, have never been subject to jurisdictional separations, and cannot determine how to assess and bill each of their customers using the new line item. The Commission plainly understands that it cannot – not should it seek to – prevent carriers from recovering their costs of mandatory regulatory programs such as USF. Thus, the Commission should act immediately to clarify its rules and make its line item recovery policies for CMRS consistent with its long-standing forbearance from CMRS rate regulation.

Specifically, Nextel requests clarification, or reconsideration, if necessary, of the Commission's approach in allowing CMRS carriers to recover some, but not all of the costs of the federal Universal Service program in USF line items placed on individual customer's bills. As an initial matter, CMRS carriers need clarification that they may use the Commission's new safe harbor, or their own company-specific good faith estimates of interstate revenues, to calculate each end user customer's interstate line item assessment. While this is the only logical inference from the record and text of the Report and Order, the rules adopted by the Commission can be read otherwise, thereby creating unwarranted ambiguity.[2] Second, the Commission must reconsider prohibiting CMRS carriers from recovering their federal universal service contribution costs through a separate line item that includes any mark-up above the relevant contribution factor. While the Commission expressed grave concern about *interexchange* carrier line item cost recovery practices, it did not have a similar record upon which to prescribe *CMRS rates* relating to USF. The Commission cannot abandon the CMRS rate forbearance it has had in place for nearly ten years without any findings or record of CMRS carrier abuse. Third, the CMRS market has evolved in such a way that "an all-or-nothing rule" for applying the wireless safe harbor or reporting "actual" interstate revenues for all affiliated legal entities would lead to absurd results.[3] The Commission should apply a more workable common sense "control" test to determine which entities are "commonly controlled" affiliates. Finally, the Commission

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[2] Nextel recognizes that the Cellular Telecommunications and Internet Association has asked the Commission to clarify this "company-specific proxy" issue and that the Commission has indicated that it would issue a clarification that wireless carriers may, in fact use their own estimates. In the event that the Commission does not issue a clarification prior to the filing of this petition, Nextel, out of an abundance of caution and to preserve the issue for Commission clarification, includes this issue in this petition.

[3] The Commission used one of several possible definitions of affiliate; that is a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. 47 U.S.C. § 153(1). As explained herein, the Commission used a definition of affiliate that could force virtually every carrier in the industry to make the same election.

should adopt a broader view of the necessary exemptions from USF assessment for state and local governments.

II. THE COMMISSION MUST CLARIFY THE APPLICATION OF ITS NEW USF LINE ITEM RULE TO CMRS OPERATIONS.

New rule Section 54.712 states that "If a telecommunications carrier chooses to recover its federal universal service contribution costs through a line item on a customer's bill, as of April 1, 2003, the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor."[4] The rule specifically limits line item cost recovery to an individual customer's interstate telecommunications portion of its total bill times the relevant USF contribution factor.

Landline carriers can apply this rule without difficulty by identifying their telecommunications traffic and related revenues on a jurisdictional basis. It cannot work at all in the context of CMRS services, that typically are purchased by customers on a "bucket of airtime minutes" basis. Recognizing this, the Report and Order, in a footnote, states that "[f]or CMRS providers, the portion of the total bill that is deemed interstate will depend on whether the carrier reports actual revenues or utilizes the safe harbor. For wireless telecommunications providers that avail themselves of the interim safe harbors, the interstate telecommunications portion of the bill would equal the relevant safe harbor percentage times the total amount of telecommunications charges on the bill."[5]

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[4] 47 C.F.R. § 54.712 (as revised).

[5] Report and Order at n.131.

While the footnote is a helpful interpretation of how wireless carriers may apply the safe harbor as the proxy for the interstate telecommunications revenues, it does not specifically address the situation of a CMRS carrier that has developed the capability of sampling traffic flows to estimate in good faith its amount of interstate traffic as a proxy for interstate revenues.[6] The Commission plainly is encouraging all CMRS carriers to develop this capability, and the Report and Order states that the Commission's decision to set the interstate safe harbor at the high end of the range of interstate CMRS traffic should provide CMRS carriers with appropriate incentives to invest in traffic studies.[7]

Because of this, the Commission should clarify that wireless carriers can also use their good faith interstate estimates to determine the "relevant interstate portion of the bill" in the same manner as the Commission has stated CMRS carriers can apply the new 28.5 percent safe harbor as a proxy for the relevant interstate portion of the bill. Indeed, permitting CMRS carriers to apply either the new safe harbor or the CMRS carrier's own estimate of interstate revenues to a customer's bill to determine the customer's assessment is the only result that makes sense in light of the fact that the revised safe harbor is based on a range of company-

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[6] The Commission should, however, clarify that wireless carriers can use the safe harbor as their interstate revenue proxy, even if it results in an assessment amount above the interstate portion of any particular customer's bill multiplied by the contribution factor. While this result appears inconsistent with the language of new rule 54.712, it is consistent with the direction of footnote 131. Indeed, the Commission cannot have meant for wireless carriers to be left without the option of utilizing the safe harbor as a factor in setting an end user line item rate, which the Commission reaffirmed as an acceptable option for wireless providers in the Report and Order.

[7] Report and Order at ¶ 22 ("Setting the safe harbor at the high end of the range of estimates provided by the wireless studies should provide mobile wireless providers an incentive to report their actual interstate telecommunications revenues if they are able to do so.").

specific traffic data studies.[8] There simply is no evidence in the record that any wireless carrier could measure interstate revenues for contribution purposes other than through aggregated traffic studies or that CMRS carriers can determine the proportion of interstate traffic on a customer-specific basis to recover contribution costs from customers. Rather, some carriers have developed the capability to conduct aggregated studies of their traffic flows to determine a reasonable proxy of the proportion of interstate traffic, which in turn provides a reasonable proxy of a carrier's proportion of interstate revenue.

The Commission should not continue to impose new costs on CMRS carriers to make them go down the road to measure and to report each and every call of each and every customer and then match customer revenues to each of these calls on a jurisdictional basis. Rather, the Commission ought to remain faithful to its basic tenants supporting CMRS -- that of reliance on vibrant competition to produce reasonable rates. Insistence on a regime where CMRS carriers are forced into a straightjacket of landline–type billing not only creates additional, avoidable regulatory costs, but it relegates CMRS to a mere adjunct to the landline network, instead of an innovative alternative.

This concern is not without foundation. While the Commission was asked by CTIA to clarify this issue immediately, AT&T Corp. and WorldCom, Inc. filed an *ex parte* letter stating their view that CMRS carriers must either use the new, nearly doubled safe harbor, or "bill

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[8] *Id*.

individual customers on that particular customer's percentage of interstate usage."[9] This statement profoundly and disingenuously misunderstands the averaged interstate usage data CMRS carriers can establish through traffic studies. It is even more disturbing, however, as a testament to the lengths that interexchange carriers are willing to go in their attempts to shift the USF funding burden from their industry to the CMRS industry, by urging the Commission to clarify that it meant to apply the new, very high safe harbor to all CMRS carriers punitively, without regard to a CMRS carrier's ability to produce its own interstate proxy.[10] The interexchange industry's continuing game of extortion should not influence the Commission in its need to clarify this issue immediately. CMRS carriers need appropriate and timely official guidance so that they can make adjustments, if necessary, well prior to April 1, 2003.[11]

III. THE PROHIBITION ON USF LINE ITEM MARK-UPS FOR CMRS CARRIERS IS AN IMPERMISSIBLE RATE PRESCRIPTION.

The Report and Order directed carriers to modify the manner in which they recover their USF costs from their customers. In an apparent attempt to "address consumer concerns

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[9] *See* Letter to Ms. Marlene Dortch, Secretary of the Federal Communications Commission, from Robert W. Quinn, Jr., Vice President of Federal Government Affairs, AT&T Corp., and Richard S. Whitt of WorldCom, Inc., at 2 (filed January 24, 2003).

[10] As the Report and Order states, the Commission selected the highest estimate of interstate traffic for only one of five national CMRS carriers, recognizing that there were lower interstate estimates in the record. The Commission stated that it was trying to get all CMRS carriers to develop their own good faith estimates, and such a statement makes no sense if the only avenue CMRS carriers have to apply a interstate proxy on end users is to use a highly inflated safe harbor. Report and Order at ¶ 22.

[11] In many cases, CMRS carriers have agreed to notify their customers in advance of rate or rate structure changes, and this requirement has to be built into any timetable the Commission gives for its line item rule.

regarding disparate contributor recovery practices" the Commission determined to apply a "rule of general application," to prohibit carriers from recovering their federal universal service contribution costs through a separate line item that includes a mark up above the relevant contribution factor.[12] Specifically, under the new framework, all carriers, including CMRS providers, are restricted from collecting any amount above the contribution factor, including any of the program's administrative costs or unbillables. Not only is the Commission's new "mark-up" policy impractical, if not impossible for CMRS carriers to implement, but it is an unjust and unreasonable rate prescription that contradicts over a decade's worth of Commission law and policy towards the deregulation of the wireless industry.

The Commission provided no justification for imposing an industry-wide prohibition on revealing the true USF cost recovery via a line item. In every one of its eight annual CMRS Competition Reports the Commission has stated that the competitive marketplace, and not rate regulation, is delivering substantial benefits to CMRS subscribers. Throwing out nearly a decade's worth of deregulation of CMRS rates and micromanaging one aspect of an overall CMRS rate – the USF cost recovery line item – is at odds with everything the Commission has strived to establish and achieve in the CMRS market. The fact that there was no discussion in the Report and Order of the Commission's reasons for applying the restriction to the CMRS industry strongly suggests the decision was made in haste and has not been given nearly enough

[12] Report and Order at ¶¶ 40, 49.

consideration.[13] Because this abrupt change in course was not explained, it is arbitrary and capricious. Nextel thus seeks reconsideration of the new "mark-up" requirement.

A. CMRS Carriers Have Been Operating Under A Hugely Successful Deregulatory Scheme for Almost a Decade.

Pursuant to authority from Congress to forbear from regulation of the rates charged by CMRS carriers under Section 332, the Commission in 1994 determined to forbear from regulating CMRS carrier rates. In making that determination, the Commission observed that: "in a competitive market, market forces are generally sufficient to ensure the lawfulness of rate levels, rate structures, and terms and conditions of service set by carriers who lack market power. Removing or reducing regulatory requirements also tends to encourage market entry and lower

[13] The Commission's "mark-up" restriction violates Section 205's rate prescription procedures. Section 205 requires that a rate prescription take place "after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by [us] on [our] own initiative." 47 U.S.C. § 205(a). While this language does not automatically trigger the detailed oral hearing requirements of Section's 556 and 557 of the Administrative Procedures Act, it does require that carriers at least be provided with an opportunity to be apprised of the rate prescription and have a chance to comment on the new rate provisions. *See United States v. Florida East Coast Railway*, 410 U.S. 224 (1973). Had Nextel and other wireless carriers known that the Commission would have gone to such drastic measures to "handcuff" wireless carriers into seeking recovery of USF contributions from their rates, or that the Commission was planning to overthrow over a decade's worth of precedent deregulating wireless rates, Nextel most certainly would have protested the restriction before now. In its 1994 decision to forbear from applying rate regulation to CMRS carriers, the Commission stated that "Sections 204 and 205 provide the method of redress in the event that tariffs contain unreasonably discriminatory rates or practices. Since we have determined that we may forbear from enforcing Section 203, forbearance from enforcing Sections 204 and 205 is unlikely to injure consumers and is in the public interest." Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services, *Second Report and Order*, 9 FCC Rcd 1411, 1480 (1994) ("Second Report and Order"). The Commission has effectively reversed that forbearance determination and means to enforce Section 205 rate regulation for commercial mobile radio services, without providing CMRS providers with notice or opportunity to be heard on the issue. *See also* discussion *infra* at n.29.

costs."[14] Because CMRS was and continues to be an intensely competitive market, the Commission exercised its forbearance authority for both interstate and any intrastate wireless charges. As part of its decision, the Commission determined that the anticipated competitive market for CMRS would be enhanced by its forbearance from such rate regulation.

The decision to forbear from CMRS rate regulation was a deliberate and successful policy decision designed to foster competition among CMRS carriers and thereby "regulate CMRS through competitive market forces" rather than through pervasive rate regulation or other forms of regulation.[15] The Commission consistently and uniformly has rejected requests by states to impose any sort of regulatory constraint on CMRS carrier rates.[16]

The deregulatory market structure under which CMRS carriers have been operating for almost a decade is critical to CMRS carrier operations and CMRS carriers have come to rely on

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[14] Second Report and Order, 9 FCC Rcd at 1478.

[15] *See* Jacqueline Orloff v. Vodafone AirTouch Licenses LLC, d/b/a Verizon Wireless, *Memorandum Opinion and Order*, 17 FCC Rcd 8987, 8998-99 (2002), *appeal pending*. ("Orloff"); *see also* Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, *Memorandum Opinion and Order*, 14 FCC Rcd 19898, 19907 (1999) ("Southwestern Bell") (stating that "the congressional policy to favor competition over regulation, where in the public interest, is also clearly reflected in the enactment of the Telecommunications Act of 1996.").

[16] The Commission rejected every state request – seven in all – to regulate the rates for CMRS service within its borders. *See, e.g.*, Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates, *Report and Order*, 10 FCC Rcd 7486 (1995); Petition of the Connecticut Dept. of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, *Report and Order*, 10 FCC Rcd 7025 (1995), *aff'd sub nom. Connecticut Dept. of Public Utility Control v. FCC,* 78 F.3d 842 (2d Cir. 1996).

the Commission's deregulatory policies for all aspects of their business. Changes to wireless carrier cost recovery mechanisms that disrupt this deregulatory regime and impose restrictions on how wireless carriers recover the costs of a single regulatory program should not be put in place without a thorough examination of their implications on CMRS as a whole.

B. A Cost Recovery Restriction is CMRS Rate Regulation.

The regulation of a carrier's rates is not limited to out-and-out rate-setting by the regulator. Indeed, it is well-understood that the "rates charged by" wireless service providers, "include[s] both rate levels and rate structures."[17] As the Commission itself has recognized, the

> term "rates charged" in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. *Accordingly, states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers*.[18]

Thus, "[r]ates … do not exist in isolation" but rather are made up of the components of what it costs to provide the services to which they are attached.[19]

[17] Southwestern Bell, 14 FCC Rcd at 19907 (1999). Following *Southwestern Bell*, the California Court of Appeals held that § 332(c)(3)(A) preempted a challenge under California's consumer protection statute to whole minute billing and other aspects of wireless pricing and service. *See also Digital Communications Network, Inc. et al. v. AT&T Wireless Services and Airtouch Cellular, Inc.*, 63 F. Supp. 2d 1194 (C. D. Cal. 1999). Digital Communications alleged that AT&T Wireless, Inc. and Airtouch Cellular, Inc. violated the Communications Act by refusing to offer them discounted cellular telephone rate plans. The court found that the Commission has primary jurisdiction over such matters.

[18] Southwestern Bell, 14 FCC Rcd at 19907.

[19] *Bastien v. AT&T*, 205 F.3d 983, 9886 (7th Cir. 2000) (quoting *AT&T v. Central Office Telephone*, 524 U.S. 214, 223 (1998)).

The courts and the Commission agree, confirming that rate regulation necessarily includes regulation of how and whether carriers choose to recover their costs through their rate structures, and any regulation of a carrier's recoupment of its costs necessarily involves the regulation of that carrier's rates for service.[20] The Commission's attempt therefore to revoke CMRS carriers' rights to mark up federal universal service line-item charges above the relevant assessment amounts on consumer bills is rate regulation in its truest form and is wholly at odds with other cost recovery policies the Commission instituted for CMRS providers.

In the E-911 implementation context, for instance, the Commission flat out rejected proposals by Nextel and other carriers to adopt definitions of recoverable or non-recoverable costs. According to the Commission:

> "it would be . . . [contrary to] the public interest for the Commission to establish such regulatory approaches to administering a cost recovery mechanism for an industry that is not currently rate regulated . . . By excluding CMRS carriers from formal rate regulation, Congress and the Commission have determined that the public inherently benefits from the promotion of competition among the carriers that results from market-based pricing for their services, and carriers have been supportive of such deregulation."[21]

The Commission applied the same deregulatory principle in the number portability context, and for number pooling: "carriers not subject to rate regulation -- such as competitive LECs, CMRS providers and non-dominant IXCs -- may recover their carrier-specific costs . . . in any lawful

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[20] *AG v. PSC*, 597 N.W.2d 264 (Mich. Ct. App. 1999) ("a utility's future rates inevitably include the recoupment of certain costs already incurred."); *See also*, *Abrams v. Public Service Comm'n*, 136 A.D.2d 187 (N.Y. App. Div. 1988) (Under the entire scheme of statutory ratesetting, the determination of "just and reasonable charges" includes a the "cost recovery element thereof").

[21] Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Second Memorandum Opinion and Order*, 14 FCC Rcd 20850, 20872 (1999).

manner consistent with their obligations under the Communications Act."[22] Even in *Computer III*, the Commission did not require carriers to recover revenue shortfalls on the regulated Title II side of their business from the unregulated (enhanced service) portion of their operations.[23] It is truly baffling that the Commission has chosen, in the context of USF cost recovery, to reverse years of precedent and to require CMRS carriers to recover the shortfall created by the Commission's tightly prescribed line item elsewhere in highly competitive deregulated CMRS rates. The Commission effectively appears to have left carriers with no choice but to shift their unrecovered USF burden to their other rates. The Commission's prescription is inflexible and prevents CMRS carriers from sharing with their customers the true cost of the USF program in a competitively neutral manner.[24]

Contrary to the statements in the Report and Order, the Commission did not leave any flexibility on the matter of line item cost recovery – it directed administrative costs be recovered

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[22] Telephone Number Portability, *Third Report and Order,* 13 FCC Rcd 11701, 11774 (1998); Numbering Resource Optimization; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Telephone Number Portability, *Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200*, 17 FCC Rcd 252, 268 (2001).

[23] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof; Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, *Report and Order*, 104 F.C.C.2d 958 (1986).

[24] The mark up restriction is also is inconsistent with the Commission's long standing policy to strike a balance between the need to protect the public interest and a carrier's ability to recoup its costs of doing business. *See, e.g., Nader v. FCC*, 520 F.2d 182, 201 (D.C. Cir. 1975) (the "Federal Communications Commission, in carrying out its statutory responsibility to ensure that the carrier's charges are just and reasonable, attempts to set rates at a level that will cover the carrier's cost of service including a fair return to the utility's stockholders.").

someplace else. According to the Commission, "Carriers will continue to have flexibility to recover their contribution costs through their rates or through a line item."[25] Yet this "line item," according to the language of the rule, may never exceed the interstate telecommunications portion of the bill times the relevant contribution factor. Because wireless carriers do not have the ability to determine each and every customer's interstate charges for a particular billing cycle, they are left with recovering any costs not recovered by a line item through other rate elements. For those customers explicitly exempted from payment and for those that simply refuse to pay,[26] there will be a significant shortfall. Under the existing CMRS regulatory regime, CMRS carriers would have the flexibility to decide how to recover this shortfall, including by assessing remaining customers equitably.

Not only does the new "mark up" restriction make no sense from an historical perspective, but it also does not serve its stated purpose, *i.e.*, to reduce excessive IXC line item USF mark ups. According to the Report and Order, the major motivating factor for elimination of the mark-up is the fact that IXC line items for USF costs significantly exceed the amount of the contribution factor. Indeed, the Commission itself acknowledges this point: "The contribution factor for the fourth quarter of 2002 is approximately 7.28 percent, but the federal universal service line items assessed on residential customers by the three largest interexchange carriers significantly exceed this amount."[27] Not surprisingly, there is no showing of a similar

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[25] *See* Report and Order at ¶ 53.

[26] It has been Nextel's experience that certain state and local government customers dispute their obligation to pay federal USF charges. *See* discussion *infra* at Section V.

[27] Report and Order at ¶ 46.

CMRS problem. Certainly Nextel has never treated its USF funding obligation as an opportunity to make money; it is just the opposite; these fees, no matter whether they are listed as a line item or as part of some other rate element, depress demand for wireless services.[28] Therefore, wireless carriers have no economic incentive to over-recover since to do so could reduce demand for their services. Yet, despite the fact that the IXCs are the parties the Commission identifies as over-recovering, the Commission prescribes a rate structure for *all* carriers, including wireless carriers, whose rates have been deregulated for nearly 10 years. The Commission has effectively overturned a decade's old forbearance policy for commercial mobile radio services, without providing CMRS providers with notice or opportunity to be heard on the issue.[29]

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[28] As Nextel explained in its December 4, 2002 *ex parte* filing, wireless services are extremely susceptible to changes in demand as the total price of the service increases with increasing taxes, fees and assessments ("TFAs"). In contrast, very few customers of local wireline service disconnect service when TFAs increase. The failure to take relative elasticity of consumer demand for services into account when allocating USF program burdens creates additional, unnecessary deadweight loss on the economy, on telecommunications service consumers and on the telecommunications industry. To minimize their detrimental effect on the nation's overall economic welfare, therefore, TFAs generally should be increased more on those services for which demand would change comparatively less. *See* Letter to Michael K. Powell, Chairman of the Federal Communications Commission, from Leonard J. Kennedy, Senior Vice President and General Counsel for Nextel Communications, Inc., and Lawrence R. Krevor, Vice President of Government Affairs for Nextel Communications, Inc., at 2 (filed December 4, 2002).

[29] It is well-established that due process and the Administrative Procedure Act require notice and the opportunity to be heard. *See, e.g., North American Pharmacal, Inc. v. Dept. of H.E.W.*, 491 F.2d 546 (8th Cir. 1973). Critically, the District of Columbia Circuit recently observed that "the notice requirement of the APA does not simply erect arbitrary hoops through which federal agencies must jump without reason. Rather, the notice requirement 'improves the quality of agency rulemaking' by exposing regulations 'to diverse public comment,' ensures 'fairness to affected parties,' and provides a well-developed record that 'enhances the quality of judicial review.'" *Sprint Corporation, et al., v. FCC*, No. 01-1266 Consolidated with Nos. 01-1521, 01-1522, 02-1041, 02-1042, 2003 U.S. App. LEXIS 910 (Decided January 21, 2003) (citations omitted). Thus, "an agency's imposition of requirements that 'affect subsequent [agency] acts' and have a 'future effect' on a party before the agency triggers the APA notice requirement." *Id.*

(continued…)

The Commission should not view the actions it has taken with respect to the mark-up lightly. Not only does it contravene years of wireless rate deregulation, but it imposes unnecessary added administrative costs on carriers that are already overly burdened by the costs of implementing other costly Commission mandate programs. Nor should the Commission essentially force wireless carriers to hide the true costs of the USF program from their customers. To do so is inconsistent with the Commission's own billing objectives, and could unnecessarily fuel state concerns about carrier billing practices. The new rate prescription rule will require carriers to modify drastically their billing practices, and to incur additional administrative costs associated with USF collection from end users that cannot be recovered through the newly-constrained USF line item.[30] In addition, any carrier that applies a federal USF line item charge above the relevant assessment amount could be subject to an enforcement action for an Commission rule violation.

Despite these additional carrier-incurred costs, however, the Commission found it not "appropriate for carriers to characterize these administrative and other costs as regulatory fees or

(..continued)
(citations omitted). And, "new rules that work substantive changes in prior regulations are subject to the APA's procedures." *Id*. Where a party to an administrative proceeding is reasonably apprised of issues in controversy, notice is deemed sufficient. *See Savina Home Industries v. Secretary of Labor*, 594 F.2d 1358 (10th Cir. 1979). In this instance, the CMRS rate prescription requiring wireless carriers to limit their USF pass through has the future effect of regulating CMRS carrier rates. CMRS providers were not "reasonably apprised" that over a decade's worth of regulatory policy would be altered in the USF context.

[30] As the Commission itself recognized: "these changes may require modifications in billing practices for certain carriers . . . [and] we acknowledge that contributors may continue to incur some administrative costs associated with the collection of the universal service charges from end users that may not be recovered through a federal universal service line item." Report and Order at ¶¶ 52-54.

universal service charges after April 1, 2003 . . . [and] unreasonable [for carriers] to describe an amount as a universal service regulatory fee when that amount varies from the contribution factor mandated by the regulator."[31] The Commission is forcing carriers to incur indeterminate, and likely excessive, additional administrative costs associated with their billing mechanisms for the USF contribution while at the same time limiting their ability to recover such costs in a line item that is meant to capture the costs of the program. The Commission has created a USF assessment "Catch-22" for unregulated carriers. This warrants reconsideration of the new "mark up" restriction as to CMRS carriers.

IV. THE "AFFILIATE" REQUIREMENT FOR THE WIRELESS SAFE HARBOR IS INCONSISTENT WITH COMMISSION PRECEDENT AND UNSUPPORTED BY THE RECORD.

The Report and Order adopts an "all-or-nothing" rule for wireless carriers seeking to avail themselves of the safe harbor. Under this rule, wireless providers will be required to decide whether to report either actual end user interstate revenues or safe harbor revenues for all of their affiliated legal entities.[32] This "all or nothing" rule makes no sense for wireless carriers which, because of historical reasons related to initial licensing, operate in a much more complex corporate environment than other landline carriers and are often "affiliated" with entities that have no say in their day-to-day operations. The Commission's requirement that all CMRS

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[31] *Id*. at ¶ 54.

[32] *Id.* at ¶ 25. Thus, while carriers may now pick and choose which affiliated legal entities report actual interstate telecommunications revenues or the safe harbor percentage of revenues, rather than making their election on a company-wide basis, including all affiliated entities, they will not be able to do so in the future.

"affiliated" entities must choose the same contribution method (*i.e.*, actuals or safe harbor) fails to consider the unique structure of the wireless market.

Moreover, the Commission failed to articulate any reason why all affiliated carriers must chose the same contribution method or how such uniformity would in any way enhance the USF program. The Commission choose, without any explanation, the definition of affiliate contained in Section 3 of the Act, which defines an "affiliate" as any person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person.[33] Critically, in this particular definition the term "own" "means to own an equity interest (or the equivalent thereof) of more than 10 percent."[34]

Applying this standard to the CMRS industry – an industry with a "significant degree of affiliation," even among carriers competing in the same market – will lead to absurd results. Indeed, wireless carriers that have an excess of 10 percent common ownership, which are not under common control or common operation, will now be required to consult each other about pricing and billing decisions where they did not (and, for anti-trust reasons, should not) do so before. The Commission itself recognized the problems associated with application of a ill-tailored "affiliate" rule to CMRS providers in the interexchange rate integration proceeding and refused to apply rate integration across affiliates.[35] In that proceeding, the Commission

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[33] 47 U.S.C. § 153(1).

[34] 47 U.S.C. § 153(1).

[35] Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Order*, 12 FCC Rcd 15739 (1997).

specifically concluded, after specific consideration, that the application of "too stringent an affiliation rule could be unworkable and adversely effect pricing and customer choice, because of the complex nature of the CMRS market."[36]

These same complexities still exist in the CMRS market today and make application of the "all or nothing" rule in the USF context equally unworkable. Under the new "affiliate" requirement, for example, CMRS carriers that did not have attributable interests in each other under the former spectrum cap (Section 20.6) will now be forced to share policies and information that could lead to potential anti-trust or other legal and practical problems.

In addition to forcing carriers into precarious legal and practical situations, the "all or nothing rule" is completely unjustified. The Commission articulated no reason why "affiliates" should be required to choose the same contribution methodology. According to the Commission, "[I]f a wireless telecommunications provider can and does separate its interstate revenues from intrastate revenues for universal service contribution purposes, we find that it is reasonable to presume that its affiliates subject to the same safe harbor can employ the same measures to report their interstate revenues. It is inappropriate, therefore, to allow affiliated wireless providers to 'pick and choose' which entities use the interim safe harbors."[37] Nothing more is offered to demonstrate why the "all or nothing rule" is necessary or how it will assist in stabilizing the USF program or in any way advance the public interest.

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[36] Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, *Further Notice of Proposed Rulemaking*, 14 FCC Rcd 6994, 7003 (1999).

[37] Report and Order at ¶ 25.

In today's marketplace there are significant levels of wireless carriers "affiliation" despite the fact that "affiliated" entities have no corporate governance or input in the daily business decisions of one another. Oftentimes, wireless entities could be "affiliated" with different licensees offering different services altogether, *i.e.*, paging, satellite. Thus, while it might make sense for one licensee to contribute to the universal service fund based on actual end user interstate revenues, it might make more sense for an "affiliated" licensee to use the wireless safe harbor. The Commission recognized this in the rate integration context and should do so in the USF context.

Thus, the Commission should first and foremost, apply an affiliate standard that focuses on actual ability to control operations jointly. Should the Commission determine to maintain the "affiliate" restriction on wireless carriers for purposes of using the safe harbor or an estimate of interstate traffic, it must substantially narrow the definition to be based on actual control. The Commission could model the definition after that contained in Section 1.2110 (to be used as a guideline), however, the Commission should include a rebuttable presumption that separately traded public corporations should not be considered "affiliates" for this purpose.[38]

V. CREATING NEW CLASSES OF USF EXEMPT CUSTOMERS PREVENT REVENUE SHORTFALLS.

New rule Section 54.712 prohibits wireline and wireless carriers from averaging their USF program contribution costs across all end-user customers when establishing federal universal service line-item amounts. This creates a situation where CMRS carriers cannot recover the costs of USF from certain designated customer classes, and at the same time cannot

[38] 47 C.F.R. § 1.2110.

collect the shortfall from others, except in general rates or by specifying another line item on customer bills. This prescription is irrational and unworkable, and must be modified on reconsideration.

The Commission prohibited recovery of USF line items from Lifeline service customers of LECs and other Eligible Telecommunications Carriers. The Commission should enlarge this exemption and clarify that carriers are permitted to recognize customer exemptions from USF assessments due to basic public policy reasons and the tax status of state and local governments.

As Nextel explained in its comments, some state and local government customers contest their obligation to pay federal USF charges and use this as leverage in the bidding process for government contracts.[39] If this trend continues, it raises the prospect of carriers discriminating in favor of state and local government customers or carriers having to renegotiate contracts with these entities to make up for the recovery shortfall. This type of contract renegotiation is simply not possible. Individual wireless carriers do not have the market power to require that state and local governments reopen their procurement processes. Even assuming that it could be done, significant additional time and resources would be necessary to reopen and renegotiate all government contracts.[40]

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[39] Comments of Nextel Communications Inc., in CC Docket No. 96-45, *et al*. at 28 (filed on April 22, 2002) ("Nextel Comments").

[40] Assuming that they can, CMRS carriers will charge government customers the USF fee and write-off any subsequent non-payment as bad debt. Under the revised rules, a carrier would still pay USF on the collected portion of their bills. This creates an underrecovery that the Commission appears to proscribe being recovered via a USF line item on other customers. In many other cases, given the complexities of dealing with writeoffs in government procurement, the government customer may get a *de facto* exemption but the Commission cannot make the CMRS carrier simply absorb the cost – it has to be recovered somewhere.

Allowing CMRS carriers to recognize certain customer exemptions from USF charges eliminates the prospect of carriers being forced to discriminate in favor of state and local government customers and would be consistent with public policy. Such exemptions would also lessen carrier costs of litigation, create a more neutral competitive environment and eliminate the administrative burdens on carriers. Nextel thus requests clarification from the Commission that carriers may exempt certain state and local government customers from USF pass-through fees.

One way to do this is for the Commission to allow different categories of customers to be dealt with differently. The exemption for state and local governments from payment is not unlike the public policy exemption currently made to USF contributions for Lifeline telephone subscribers.[41] Under the existing system, which was affirmed in the Report and Order, ILECs may not recover universal service contributions from their Lifeline subscribers. Certainly the government customer is different from individual or even general business customers. The Commission should follow the suggestion in Nextel's initial comments and recognize certain exemptions from USF assessments due to basic public policy reasons.

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[41] Nextel Comments at 28.

VI. CONCLUSION.

In taking the interim steps that it did to "shore up" federal USF funding, the Commission made several significant missteps that call out for immediate correction or clarification. Nextel thus requests that the Commission act in accordance with this petition.

Respectfully submitted,

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